

**STATE OF TENNESSEE**  
OFFICE OF THE  
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Opinion No. 04-102

Authority of the Secretary of State to Adjust the Lapse Date on Financing Statements Having Initial Maturity Dates Beyond June 30, 2006

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**QUESTION**

Does the Secretary of State have the current authority to adjust the lapse date to June 30, 2006, on U.C.C. financing statements filed prior to July 1, 2001, whose initial maturity dates are beyond June 30, 2006, and whose debtors are not identified on the financing statements as transmitting utilities, in order to conform to the provisions of Tenn. Code Ann. § 47-9-705(c), as amended in 2000? If not, may the Secretary of State promulgate a rule to effect such adjustments?

**OPINION**

Yes. The Secretary of State does have the authority to adjust the lapse date to June 30, 2006, on U.C.C. financing statements filed prior to July 1, 2001, that show effective dates after June 30, 2006. Although it may not be absolutely necessary that the Secretary of State promulgate a rule to effect these adjustments, it is recommended that he do so.

**ANALYSIS**

As part of revisions to the Uniform Commercial Code, Tennessee amended its law in 2000 to provide that almost all financing statements, with the exception of those for transmitting utilities and mortgages, will be effective for a period of five years. Tenn. Code Ann. § 47-9-515(a). Furthermore, Tenn. Code Ann. § 47-9-705(c) specifies that, unless otherwise provided,<sup>1</sup> an effective financing statement which satisfies the requirements of the former Article 9 “ceases to be effective at the earlier of: (1) the time the financing statement would have ceased to be effective under the law of the jurisdiction in which it is filed; or (2) June 30, 2006.” Under the former Article 9, as adopted by Tennessee, a financing statement could have a period of effectiveness of five to twenty years. Tenn. Code Ann. § 47-9-403(2)(a) (repealed as of July 1, 2001, by 2000 Tenn. Pub. Acts, ch. 846).

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<sup>1</sup>Tenn. Code Ann. § 47-9-705(c) provides otherwise for continuation statements filed under subsection (d), financing statements filed against transmitting utilities under subsection (e), and initial financing statements under § 47-9-706.

The revised Article 9 of the U.C.C. sets a standard effective period of five years. The problem under the Tennessee statutes is that there are financing statements that were properly filed and perfected under the former Article 9 whose stated period of effectiveness extends beyond June 30, 2006. The new Article 9 does not allow these financing statements to have effect after June 30, 2006, unless affirmative action is taken to continue them.

Tenn. Code Ann. § 47-9-515(d) contains a provision for the filing of a continuation statement to extend the effectiveness of a financing statement.<sup>2</sup> However, “[a] continuation statement may be filed only within six (6) months before the expiration of the five-year period specified in subsection (a) . . . .” Tenn. Code Ann. § 47-9-515 (d). Since the records in the Secretary of State’s office reflect the former lapse dates of the financing statements, confusion may arise as to when this six-month period commences. Unless the dates on the financing statements are adjusted to show the new lapse date, it will not be clear when a continuation statement may be filed. For example, a properly filed financing statement filed on January 31, 2000, with an effective period of twenty years would show a lapse date of January 31, 2020. Unless the Secretary of State is permitted to adjust the lapse date to June 30, 2006, it will not be clear from the records that a continuation statement can be filed anytime after December 30, 2005, and before June 30, 2006.

The Secretary of State has asked whether he has the authority to adjust the lapse date to June 30, 2006, on the financing statements that presently indicate effective periods extending beyond June 30, 2006, so that it will be clear that the secured parties have a six-month window in which to file a continuation statement. It is the opinion of this office that the Secretary does have this power. In making such adjustments of the stated termination date, the Secretary of State would merely be correcting the records he maintains to conform to the law on termination of financing statements. This power is inherent in the proper execution of the Secretary’s duties. Thus, the Secretary of State does have the authority to adjust the lapse date to June 30, 2006, on U.C.C. financing statements filed prior to July 1, 2001, whose stated effective dates are beyond June 30, 2006.

Moreover, the Secretary of State may remove any doubt about his authority through exercise of his rulemaking powers. Tenn. Code Ann. § 47-9-526 states that the Secretary of State “shall adopt and publish rules to implement this chapter. The filing-office rules must be: (1) consistent with this chapter; and (2) adopted and published in accordance with the Uniform Administrative Procedures

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<sup>2</sup> Tenn. Code Ann. § 47-9-705(d) states that:

The filing of a continuation statement after this act takes effect does not continue the effectiveness of the financing statement filed before this act takes effect. However, upon the timely filing of a continuation statement after this act takes effect and in accordance with the law of the jurisdiction governing perfection as provided in Part 3, the effectiveness of a financing statement filed in the same office in that jurisdiction before this act takes effect continues for the period provided by the law of that jurisdiction.

Act, compiled in Title 4, Chapter 5.” Adopting such a rule would be consistent with Chapter 47 of the Tennessee Code; specifically, it would be consistent with Tenn. Code Ann. § 47-9-705(c)(2), which states that “the financing statement ceases to be effective . . . [on] June 30, 2006,” and such a rule would be consistent with Tenn. Code Ann. § 47-9-515(d), which allows for a six-month window for the filing of continuation statements. Changing the Secretary of State’s records to reflect the correct lapse date under current law would make apparent to secured parties that they have the opportunity to continue their interest beyond June 30, 2006. While the Secretary might make the adjustments to reflect the new law even in the absence of a rule, a rule serves to implement the clear directive of § 47-9-526 and to explain the impetus for the Secretary’s action to those who may be unaware of the new statutes.

Adjusting the lapse date of certain financing statements would not be an unconstitutional “taking” under the Fifth Amendment. The Supreme Court stated in *United States v. Locke*, 471 U.S. 84, 104, 105 S.Ct. 1785, 1797 (1985), “even with respect to vested property rights, a legislature generally has the power to impose new regulatory constraints on the way in which those rights are used, or to condition their continued retention on performance of certain affirmative duties. As long as the constraint or duty imposed is a reasonable restriction designed to further legitimate legislative objectives, the legislature acts within its powers in imposing such new constraints or duties.” In this case, the Secretary of State is merely implementing the law passed by the legislature whose purpose is to centralize and make uniform the location and method of filing financing statements. This is a legitimate legislative objective and the requirement that a party file either a continuation statement or an initial financing statement is a reasonable restriction.

Some might contend that § 47-9-705 is retroactive in application since it appears to take away vested property rights. Article I, § 20, of the Tennessee Constitution forbids retrospective laws. “When a statute creates a new right, eliminates a vested right, or impairs a contractual obligation, its retrospective application is constitutionally forbidden.” *Collier v. Memphis Light, Gas & Water Div.*, 657 S.W.2d 771, 775 (Tenn. App.), *perm. app. denied* (Tenn. 1983). However, a statute does not operate retrospectively simply because it upsets expectations based in prior law. *Landgraf v. USI Film Products*, 511 U.S. 244, 269, 114 S.Ct. 1483, 1499 (1994). Although § 47-9-705 may upset expectations, it is not retroactive in application since it specifies an action a person must currently take to preserve his rights in the future. The statute does not eliminate a vested right; rather, it simply requires the secured party to take additional steps that are entirely reasonable and are necessary to accomplish the Legislature’s goal of standardizing the effectiveness of UCC financing statements. Conditioning retention of a vested right on performance of affirmative administrative duties is constitutionally permissible. *United States v. Locke*, 471 U.S. 84, 105 S.Ct. 1785 (1985).

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